

**STATE OF MICHIGAN  
IN THE SUPREME COURT**

IN RE REQUEST FOR ADVISORY  
OPINION REGARDING  
CONSTITUTIONALITY OF 2005 PA 71

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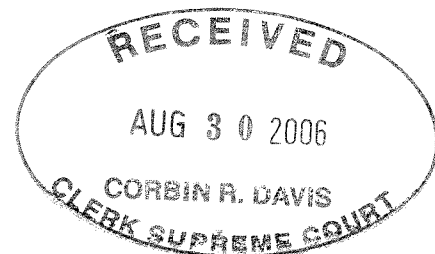
Supreme Court No. 130589

**REPLY BRIEF OF THE MICHIGAN HOUSE OF REPRESENTATIVES**

MICHIGAN HOUSE OF REPRESENTATIVES  
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The Honorable Craig DeRoche  
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**ORAL ARGUMENT REQUESTED**



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## **I. INTRODUCTION**

The Michigan House of Representatives files this brief in reply to the August 9, 2006 Reply Brief of Attorney General in Support of Constitutionality of 2005 PA 71 ("Supporting AG Reply Br"), the August 9, 2006 Reply Brief of Attorney General Opposing Constitutionality of 2005 PA 71 ("Opposing AG Reply Br"),<sup>1</sup> and the August 11, 2006 Brief *Amicus Curiae* of the Michigan House Democratic Caucus ("House Democrats Br").

## **II. ARGUMENT**

### **A. The House Speaker Has The Authority To File A Brief On Behalf Of The Michigan House Of Representatives**

The Attorney General and the House Democrats assert that the House Speaker did not have the authority to file a brief in this case on behalf of the House of Representatives, or represent its interests before this Court. (Supporting AG Reply Br at 14-15; House Democrats Br at 4-7.) These assertions are wrong both as a matter of fact and as a matter of law.

The House of Representatives chooses its own officers and determines its own rules. Const 1963, art 4, § 16. Under House Rule 7(2), the Speaker is the chief administrator of the House of Representatives. Pursuant to House Rule 7(2), the Speaker, among other things, routinely enters contracts, settles lawsuits, requests and obtains legal representation, and negotiates with the Senate and Governor on behalf of the House of Representatives. The

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<sup>1</sup> The July 19, 2006 Brief of Attorney General Opposing Constitutionality of 2005 PA 71 is hereafter referenced as "Opposing AG Br." The July 19, 2006 Brief of the Michigan House of Representatives is hereafter referenced as "House of Reps Br."

Speaker's submission of a brief on behalf of the House of Representatives in this case is wholly consistent with this grant of authority under the House Rules—and it is especially so given that the House of Representatives passed the law at issue and passed a resolution requesting the advisory opinion as to the constitutionality of that law.

By challenging the Speaker's authority to cause the House of Representatives to participate in this case on behalf of the House of Representatives as an institution, the Attorney General and the House Democrats apparently invite this Court to delve into the internal affairs of the House of Representatives. Should this Court have any reservations whatsoever in light of these challenges by the Attorney General and House Democrats, attached as Exhibit 1 is a copy of House Resolution No. 55 (August 30, 2006).<sup>2</sup> This resolution expressly ratifies the Speaker's prior actions in this case and reaffirms his authority to continue to represent the interests of the *House of Representatives* before this Court.

**B. This Court Has Jurisdiction To Issue An Advisory Opinion On The Constitutionality Of 2005 PA 71**

Except where the Legislature by a two-thirds vote gives it immediate effect, the effective date of legislation is either 90 days from the end of the session at which it was passed or a date beyond the 90 days which is stated in the legislation. Const 1963, art 4, § 27. By its express language, the effective date of Section 523 of 2005 PA 71 is January 1, 2007.

Const 1963, art 3, § 8 states:

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<sup>2</sup> An official copy of HR 55 was not available at the time of the filing of this Brief, but will be filed with the Court upon its availability.

Either house of the legislature or the governor may request the opinion of the supreme court on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date.

The House of Representatives requested an advisory opinion on Section 523 of 2005 PA 71 after it was enacted but before its effective date of January 1, 2007. Accordingly, pursuant to the plain language of the Constitution, this Court has jurisdiction under Const 1963, art 3, § 8 to render an advisory opinion.

The Opposing AG argues that this Court lacks jurisdiction under Const 1963, art 3, § 8, because Section 523 of 2005 PA 71 took effect on March 30, 1997, the effective date of Section 523 of 1996 PA 583. (Opposing AG Br at 2-6.) This argument is legally incorrect. In addition to the correct analyses of the statutory rules of statutory construction, MCL 8.3 *et seq*, set forth by the Supporting AG which defeat the Opposing AG's jurisdictional challenge, (Supporting AG Reply Br at 3), the Constitution itself dictates that the effective date of Section 523 of 2005 PA 71 is January 1, 2007—not March 30, 1997.

Section 523 of 1996 PA 583 was amended by 2005 PA 71. Const 1963, art 4, § 25 provides: "The section or sections of the act altered or amended shall be re-enacted and published at length." Under this re-enactment clause, "[a]n amendatory act has a repealing force, by the mechanics of legislation . . . . Where a section of a statute is amended, the original ceases to exist . . . the old section is deemed stricken from the law, and the provisions carried over have their force from the new act, not the former." *Lahti v Fosterling*, 357 Mich 578, 587-88; 99 NW2d 490 (1959) (citing *People v Lowell*, 250 Mich 349, 354-56; 230 NW 202 (1930)). See also *People v Kevorkian*, 447 Mich 436, 461-62; 527 NW2d 714 (1994); *Ballog v Knight Newspapers, Inc*, 381 Mich 527, 537-39; 164 NW2d 19 (1969). Thus, even if the Opposing

AG's interpretation of MCL 8.3 *et seq* were correct, which it is not, a statute cannot alter the Constitution, and the Constitution establishes that the effective date of Section 523 of 2005 PA 71, including its photo identification provisions, is January 1, 2007. Accordingly, the Opposing AG's jurisdictional challenge is without merit.

**C. The Attorney General Has Placed The Issue Of The Effect Of Attorney General Opinions Before The Court**

In its opening brief, the House of Representatives noted, by way of background, that the Executive Branch's non-enforcement of Section 523 of 1996 PA 583—legislation duly passed by the Legislature and signed by the Governor—was due to the fact that the Attorney General had opined in OAG No 6930 that the law was unconstitutional and was thus not enforceable because such opinions were believed to be "binding." (House of Reps Br at 3-4 n 1.) As the House of Representatives further explained in its opening brief, attorney general opinions do not have the force of law and are not binding, (House of Reps Br at 3-4 n 1), and, thus, the Executive Branch was remiss in not implementing the law. The Opposing AG, Supporting AG, and House Democrats respond that that issue is not before the court, need not be resolved in this case, and is outside the Court's jurisdiction. (Supporting AG Reply Br at 15-16; Opposing AG Reply Br at 1-2; House Democrats Br at 8.)

The Opposing AG through his jurisdictional challenge *expressly* placed the issue of the effect of attorney general opinions before this Court. The Opposing AG argues that the time period during which this Court could exercise its jurisdiction to issue an advisory opinion (Const 1963, art 3, § 8) expired on March 30, 1997, the effective date of the photo identification requirements of Section 523 of 1996 PA 583. (Opposing AG Br at 5.) In defense of this

jurisdictional challenge, the Opposing AG argues that although OAG No 6930 prohibited implementation of Section 523 because attorney general opinions are binding on state agencies, attorney general opinions cannot change the effective dates of legislation. (Opposing AG Br at 5.) The Opposing AG has thus placed the issue of the effect of attorney general opinions directly before the Court, by expressly raising it in the context of a jurisdictional challenge.

It is of no moment that the Opposing AG and Supporting AG agree that OAG No 6930 did not change the effective date of 1996 PA 583. (See Supporting AG Reply Br at 15-16.) Jurisdiction cannot rest upon waiver or consent, *Halkes v Douglas & Lomason Co*, 267 Mich 600, 602; 255 NW 343 (1934), and a court has an independent duty to analyze whether jurisdiction exists. *In re Fraser's Estate*, 288 Mich 392, 394; 285 NW 1 (1939). The Opposing AG and Supporting AG cannot by agreement preclude this Court from addressing issues to resolve a jurisdictional challenge.

Although the Opposing AG and Supporting AG correctly conclude that OAG No 6930 did not change the effective date of 1996 PA 583 or 2005 PA 71, their *shared analysis* is fundamentally flawed. OAG No 6930 has no impact on the effective dates of 1996 PA 583 or 2005 PA 71, first and foremost because the attorney general has no authority to nullify enacted legislation. While the Attorney General can express opinions about legislative enactments, he cannot change, veto, suspend, prevent implementation of and/or render them unenforceable or unconstitutional. (See House Br at 3-4 n 1.) Accordingly, it follows that no opinion or act of the Attorney General can change the effective date of legislation for purposes of Const 1963, art 3, § 8.

The Opposing AG and Supporting AG curiously urge this Court to avoid a studied analysis of the effect of attorney general opinions. Notably, neither the Opposing AG

nor the Supporting AG avoid addressing the attorney general opinion issue in the context of their jurisdictional arguments even as they plead with this Court to ignore the same issue. (See Opposing AG Br at 5 (stating that OAG No 6930 is "binding upon State agencies . . . [but] does not change the March 31, 1997 effective date . . ."); Supporting AG Reply Br at 15 ("while OAG No 6930 was binding on state agencies, including the Department of State, its issuance certainly did not forestall the effective date of 1996 PA 583").)

Moreover, the Opposing AG attempts to distract the Court away from the attorney general opinion issue by engaging in semantics which, in fact, result in internally inconsistent statements regarding the effect of attorney general opinions. For example, the Opposing AG states that attorney general opinions are binding and can prohibit the implementation of a duly enacted law, but then argues that attorney general opinions do not have the force of law. (Opposing AG Br at 5.) This makes no sense. It is unclear how an attorney general opinion which ostensibly does not have the force of law can prohibit an executive branch official from enforcing a duly enacted law.

The bottom line is that the effect of an attorney general opinion is intertwined with the jurisdictional challenge raised by the Opposing AG. The issue, therefore, is before the Court because the Attorney General has placed it there.

**D. There Is No Authority To Support The Assertion That Attorney General Opinions Are Binding Or That The Attorney General Can Declare Legislation Unconstitutional And Unenforceable**

In its opening brief, the House of Representatives explained in an informational footnote that 1996 PA 583 was not implemented by election administrators because of two

generally held misconceptions: (1) that the attorney general has the authority to declare enactments of the legislature unconstitutional and unenforceable; and (2) that opinions of the attorney general are binding on state officers and agencies. (House of Reps Br at 3-4 n 1). The Supporting AG's response to this footnote does not disturb the soundness of the House of Representatives' analysis.

The House of Representatives does not dispute that the Attorney General may—and in fact has the duty—under MCL 14.32 to "give his opinion upon all questions of law submitted to him by the legislature, or either branch thereof, or by the governor, auditor general, treasurer or any other state officer." Nor does the House of Representatives maintain that the Attorney General's legal advice should not be honored or paid considerable respect. Rather, the issue is the *legal effect* of those opinions.

The Supporting AG's reply brief provides no authority to support the dubious proposition that attorney general opinions are binding on state agencies. As the House of Representatives demonstrated in its opening brief, a careful examination of the case law does not support the proposition. MCL 14.32 establishes the *duty* of the attorney general to give his opinion on issues of law, but does not provide that such opinions are binding or carry the force of law. In fact, it is inconceivable that the Legislature would (or could) give the attorney general the authority to render its laws unenforceable.

More telling, there is absolutely no constitutional authority—in the text, convention message to the people, or the official convention record—that establishes that the attorney general has the power to issue binding opinions or declare a statute unconstitutional and unenforceable. The Supporting AG's quotation of a convention delegate's reference to the attorney general as the State's dedicated "watchdog," during a discussion concerning whether

state officers should be elected or appointed, (Supporting AG Reply Br at 19), provides no basis to conclude that the Attorney General has the constitutional authority to effectively veto legislation or otherwise prevent the implementation of laws duly enacted by the Legislature and Governor on behalf of the people. As a matter of constitutional interpretation, a delegate comment irrelevant to the convention topic being discussed at the time cannot overcome the text of the Constitution.

In this case, the constitutional text is clear. The Attorney General cannot declare laws unconstitutional and unenforceable because he possesses no judicial power. "The judicial power of the state is vested exclusively in one court of justice . . . ." Const 1963, art 6, § 1. Constitutional interpretation is the exclusive function of the judicial branch. *See Marbury v Madison*, 5 US (1 Cranch) 137; 2 L Ed 60 (1803); *Lewis v Michigan*, 464 Mich 781, 788-89; 629 NW2d 868 (2001); *Richardson v Secretary of State*, 381 Mich 304, 309; 160 NW2d 883 (1968).

The Attorney General also possesses no authority to preclude governmental agencies from implementing state law by issuing binding legal opinions. "Each principal department shall be under the supervision of the governor unless otherwise provided by this constitution. The governor shall take care that the laws be faithfully executed." Const 1963, art 5, § 3.

In sum, the Supporting AG provides absolutely no authority, because none exists, to overcome the text of the Constitution. The Attorney General may opine regarding questions of law under MCL 14.32, but he cannot declare a statute unconstitutional and unenforceable and his opinions are not binding on state agencies or officers.

### **III. CONCLUSION**

For these reasons, this Court should issue an advisory opinion declaring that the photo identification provisions of 2005 PA 71, MCL 168.523, do not, on their face, violate either the Michigan Constitution or United States Constitution.

Respectfully submitted,

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1

Rep. Elsenheimer moved to substitute (H-1) the resolution as follows:

**Substitute for House Resolution No. 55**

A resolution to clarify the interests of the House of Representatives in the matter before the Michigan Supreme Court concerning the constitutionality of Section 523 of Public Act 71 of 2005.

Whereas, To safeguard the integrity of the elections process, the Michigan Legislature passed and the Governor signed 2005 PA 71. Section 523, among other things, required voters to produce picture identification or sign an affidavit attesting to their identity before voting; and

Whereas, The Michigan House of Representatives adopted House Resolution 199 on February 22, 2006, requesting the Michigan Supreme Court to issue an opinion pursuant to Article III, Section 8 of the Michigan Constitution regarding the constitutionality of Section 523 of 2005 PA 71 under Michigan and federal law. On April 26, 2006, the Michigan Supreme Court issued an order granting the House's request for an opinion pursuant to Article III, Section 8 of the Michigan Constitution concerning the photo identification requirements of 2005 PA 71; and

Whereas, On July 19, 2006, the Speaker of the House of Representatives caused a brief to be filed on behalf of the House of Representatives defending the constitutionality of 2005 PA 71, and requesting oral argument before the Court; and

Whereas, Issues have now been raised in other filings before the Michigan Supreme Court concerning the authority of the Speaker to act on behalf of the House of Representatives; now, therefore, be it

Resolved by the House of Representatives, That the actions of the Speaker before the Michigan Supreme Court in connection with 2005 PA 71 are hereby affirmed by the House of Representatives; and be it further

Resolved, That the Speaker is authorized to continue to represent the position and interests of the House of Representatives before the Michigan Supreme Court in connection with 2005 PA 71.